Sidek bin Ludan v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42-6-1993
ABDUL MALIK ISHAK J
30 JANUARY 1995

Evidence *— Corroboration — Child giving sworn evidence — Whether corroboration required — Whether corroboration warning necessary — Evidence Act 1950 s 133A*

Evidence *— Witness — Child witness — Sworn evidence — Evidence Act 1950 s 133A — Whether nature of the oath understood — Evidence Act 1950 s 133A*

Criminal Procedure *— Defence — Alibi — Evidence to support inadequate — Evidence show accused had ample opportunity to commit offence*

The appellant was convicted on two charges of raping a minor aged nine and sentenced to seven years' imprisonment with effect from 6 June 1993 on each of the two charges with both sentences to run concurrently. The trial court stayed execution pending the appeal. The appellant argued that: (i) the failure of the trial court to record preliminary examinations of the victim and two other child witnesses aged nine and eight, for the purpose of ascertaining their capacity to understand and give rational answers was fatal; (ii) before accepting the evidence of the child witnesses the trial court should have conducted a voire dire to determine their competency; and (iii) the evidence given by the victim's mother should be scrutinized with care as she had some purpose of her own to serve since the appellant had rejected her marriage proposal.

Held, dismissing the appeal:

(1) The trial court had embarked on preliminary examinations of the child witnesses as required under s 133A of the Evidence Act 1950 ('the Act') and rightly concluded that they understood the nature of the oaths administered to them. An infant of any age may be sworn as a witness in any criminal case, provided that such infant appears sufficiently to understand the nature and moral obligation of an oath or understands the duty of speaking the truth. Consequently, the child witnesses were allowed to give sworn testimonies before the trial court as competency depends not upon the child witness' age, but upon his or her understanding.

(2) In determining competency there is no need for a voire dire. The competency of a witness can be ascertained without having to undergo a voire dire, unlike the issue of the voluntariness of an accused's cautioned statement, which if challenged, should proceed by way of a voire dire.

(3) In the case of a sworn child witness there is a need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence. Here, the trial court rightly treated the

A evidence of the child witnesses with utmost caution and proceeded to apply and warn itself of the rule that their sworn evidence must be corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony.

(4) It was found that the evidence of the victim was sufficiently B corroborated by the two doctors who examined the victim and the appellant. In a case of this nature, the medical evidence adduced by the prosecution was sufficient to corroborate the evidence of the victim. Also, the evidence of the victim was corroborated by the prosecution witnesses.

C (5) There was no legal presumption that an interested witness such as Rosbah should not be believed. She was entitled to credence until cogent reasons for disbelief could be advanced in the light of evidence to the contrary and the surrounding circumstances.

(6) The appellant's defence of alibi was rejected as the facts showed D that he had more than ample opportunity to commit rape. The trial court had, therefore, rightly and fairly assessed all the evidence and come to the right conclusions in convicting the appellant on both charges. The finding of guilt and the conviction of the appellant on both charges was confirmed with both sentences to run concurrently from the date of judgment as public interest E would be best served if he was kept longer in prison.

[Bahasa Malaysia summary

Perayu telah disabitkan di atas dua tuduhan merogol kanak-kanak berumur sembilan tahun dan dihukum penjara selama tujuh tahun F bermula dari 6 Jun 1993 di atas kedua-dua tuduhan dan diarahkan untuk dijalankan bersama. Mahkamah perbicaraan menggantungkan perlaksanaan menantikan keputusan rayuan. Perayu berhujah bahawa: (i) kegagalan mahkamah perbicaraan untuk mencatitkan pemeriksaan permulaan ke atas mangsa dan kedua orang saksi kanak-kanak G berumur sembilan dan lapan tahun, untuk mengetahui kebolehan mereka untuk memahami dan memberi jawapan yang munasabah adalah salah; (ii) sebelum menerima keterangan saksi kanak-kanak mahkamah perbicaraan sepatutnya perlu 'voire dire' untuk menentukan kompetennya saksi kanak-kanak itu; dan (iii) keterangan H yang diberikan oleh ibu simangsa sepatutnya diberi perhatian teliti kerana dia ada sebab tersendiri iaitu kerana perayu telah menolak lamaran kahwinnya.

Diputuskan, mengenepikan rayuan ini:

I (1) Mahkamah perbicaraan telah membuat pemeriksaan permulaan di atas saksi kanak-kanak seperti yang di arahkan oleh s 133A Akta Keterangan 1950 ('Akta berkenaan') dan telah membuat kesimpulan yang betul bahawa mereka memahami sifat sumpah yang dikenakan ke atas mereka. Berapa pun umur seseorang

budak, dia boleh menjadi saksi bersumpah dalam kes jenayah jika budak itu boleh memahami sifat sumpah atau memahami kewajipannya untuk bercakap benar. Oleh itu, saksi kanak-kanak dibenarkan memberi testimoni bersumpah di hadapan mahkamah perbicaraan kerana keadaan kompeten seseorang bergantung bukannya di atas umur tetapi kefahamannya.

(2) Untuk menentukan jika seseorang saksi kompeten, tidak memerlukan 'voire dire'. Jika seorang saksi kompeten boleh diuji tanpa memerlukan 'voire dire', tidak seperti isu kesukarelaan kenyataan tertuduh yang dibuat setelah diberi amaran, yang mana jika dicabar, mestilah melalui 'voire dire'.

(3) Di dalam kes yang berkenaan dengan saksi kanak-kanak di bawah sumpah mestilah diberi amaran mengenai bahayanya sabitan tertuduh tanpa sokongan keterangan. Di sini, mahkamah perbicaraan menggunakan budi bicaranya dalam memperlakukan keterangan saksi-saksi kanak-kanak dengan penuh hati-hati dan memberi amaran kepada dirinya bahawa keterangan bersumpah yang disampaikan oleh saksi kanak-kanak mestilah disokong oleh keterangan yang akan mengesahkan kebenaran testimoni kanak-kanak itu.

(4) Keterangan si mangsa telah disokong oleh keterangan dua orang doktor yang telah memeriksanya dan perayu. Di dalam kes seperti ini, keterangan perubatan yang dikemukakan oleh pendakwa cukup untuk menyokong keterangan mangsa. Juga, keterangan mangsa disokong oleh saksi-saksi pendakwa.

(5) Tidak ada anggapan undang-undang bahawa seorang saksi yang mempunyai kepentingan dalam sesuatu kes seperti Rosnah, tidak seharusnya dipercayai. Beliau berhak dipercayai sehingga sebab-sebab yang meyakinkan untuk tidak mempercayainya boleh dikemukakan jika terdapat keterangan yang menunjukkan sebaliknya dan memandangkan keadaan sekelingnya.

(6) Pembelaan alibi yang digunakan oleh perayu tidak diterima kerana fakta-fakta menunjukkan bahawa dia mempunyai peluang yang secukupnya untuk melakukan perogolan itu. Mahkamah perbicaraan telah dengan bijaksana dan adilnya menilai semua keterangan dan membuat kesimpulan yang tepat dalam menyabitkan perayu di atas kedua tuduhan tersebut. Keputusan bersalah dan sabitan perayu itu telah disahkan dengan kedua hukuman untuk berjalan serentak dari hari perbicaraan kerana kepentingan awam hanya boleh dicapai jika beliau dipenjarakan untuk masa yang lebih lama.]

Notes

For cases on corroboration, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 526–620.

For cases on witnesses, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1635–1737.

A For cases on defence of alibi, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1118–1136.

Cases referred to

Balasingam v PP [1959] MLJ 193 (folld)
B *Din v PP* [1964] MLJ 300 (refd)
Loo Chuan Huat v PP [1971] 2 MLJ 167 (refd)
PP v Mohamed Noor bin Jantan [1979] 2 MLJ 289 (refd)
PP v Mohd Noor bin Abdullah [1992] 1 CLJ 702 (refd)
R v Allen (1839) 9 C & P 31 (folld)
R v Baskerville [1916] 2 KB 658 (refd)
C *R v Campbell* [1956] 2 QB 432; [1956] 2 All ER 272; [1956] 3 WLR 219 (refd)
R v Hill (1781) 1 East PC 439 (folld)
R v Hughes (1841) 2 Mood 190 (folld)
R v M'Rue (1938) 8 C & P 641 (folld)
D *R v Prater* [1960] 2 QB 464; [1960] 1 All ER 298; [1960] 2 WLR 343 (refd)
R v Travers (1726) 2 Str 700 (refd)
R v Whitehead (1866) LR 1 CCR 33 (refd)
R v Williams (1835) 7 C & P 320 (folld)

E **Legislation referred to**

Criminal Procedure Code (FMS Cap 6) s 289
Evidence Act 1950 ss 118, 133A
Penal Code (FMS Cap 45) s 376

F *Mohd Yamin Ismail* (*Mohd Yamin Ismail & Partners*) for the appellant.
Azman bin Abdullah (Deputy Public Prosecutor) for the respondent.

Abdul Malik Ishak J: The appellant was charged in the Sessions Court, Johor Bahru ('trial court') on two charges of raping a female minor aged nine years and ten months (it should be four months) and, after a long
G protracted trial, the appellant was found guilty and he was convicted in respect of both charges. The trial court sentenced the appellant to seven years' imprisonment with effect from 6 June 1993 on each of the two charges and both sentences were ordered to run concurrently. On an application by the appellant's counsel, the trial court stayed execution
H pending an appeal.

The charges against the appellant are as follows:

First charge

Bahawa kamu pada bulan Mac 1991 di antara tarikh yang tidak diketahui di antara jam lebih kurang 2 petang hingga 6 petang di pondok kosong di
I ladang kelapa sawit Kampung Bukit Lintang di dalam daerah Kota Tinggi, di dalam negeri Johor, telah didapati merogol seorang perempuan nama Roslayati bte Abdullah yang berumur sembilan tahun sepuluh bulan, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 376 Kanun Keseksaan.

Second charge

Bahawa kamu pada 28 April 1991 lebih kurang di antara jam 8 pagi hingga jam 12 tengahari di rumah sewa tidak bernombor Kampung Bukit Lintang di dalam daerah Kota Tinggi, di dalam negeri Johor telah merogol seorang perempuan nama Roslayati bte Abdullah yang berumur sembilan tahun sepuluh bulan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 376 Kanun Keseksaan.

The facts relied upon by the prosecution may be summarized as follows. A divorcee by the name of Rosnah bte Junid (PW4 — 'Rosnah') with two infant daughters (Roslayati bte Abdullah (PW5 — 'the victim') and Rosfadillah bte Abdullah (PW7 — 'Rosfadillah') rented a house belonging to the appellant at RM40 per month. There was evidence that prior to this, Rosnah and her two infant daughters rented another house and, at the invitation of the appellant, Rosnah decided to rent the appellant's house. The house rented by Rosnah was not far from the house occupied by the appellant and his family. Rosnah worked at a factory and had to leave her two infant daughters at home every day unattended. Rapport soon developed between the appellant and Rosnah's two infant daughters. The appellant developed a liking for the victim and this spelled trouble. Thus, on 28 April 1991 (the second charge) in the morning, the appellant like a hungry cat came and raped the victim. There was evidence that prior to this, the appellant had, between February and March 1991 (the first charge) at an empty hut at an oil palm estate belonging to the appellant, raped the victim.

Encik Mohd Yamin Ismail on behalf of the appellant strenuously argued in regard to the failure of the trial court to frame and record preliminary examinations of the victim, Rosfadillah and Norakmawati bte Norman (PW8 — 'Norakmawati') for the purpose of ascertaining their capacity to understand and give rational answers and such failure was said to be fatal. The victim was born on 3 December 1981 and when she gave evidence before the trial court on 17 June 1992 she was aged ten years six months and 14 days but on the date of the offence (the first charge) she was aged nine years and four months. Rosfadillah was born on 20 January 1983 and was aged nine years six months and nine days when she gave evidence before the trial court on 29 July 1992, and on the date of the offence (the first charge) she was aged eight years and three months. Norakmawati was born on 1 February 1983 and on the date of the offence (the first charge) she was eight years and two months and when she gave evidence before the trial court on 29 July 1992 she was aged nine years five months and 29 days.

By way of digression, it is pertinent to lay down certain well-known principles of law.

The pre-1971 position in Malaysia in regard to the evidence of a child witness, whether sworn or unsworn, is placed on the same footing as that of an accomplice.

In simple terms, this means that the rule of prudence on the necessity of warning the jury or, for that matter, the court on the dangers of

convicting on the uncorroborated evidence of a child applies equally to sworn or unsworn testimony (*Loo Chuan Huat v PP* [1971] 2 MLJ 167). But in 1971 by the introduction of the new s 133A of the Evidence Act 1950 ('the Act') the law in Malaysia in so far as it relates to the evidence of a child witness was amended and that new section reads as follows:

> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:
>
> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

The effect of this amendment is far reaching. The proviso to s 133A of the Act in simple terms means this: A conviction cannot stand on the uncorroborated evidence of an unsworn child witness. It is insufficient for the trial court to merely administer a warning on the dangers of so convicting as the amendment now makes it a rule of law, more explicitly, that the evidence of an unsworn child witness shall be corroborated (*PP v Mohd Noor bin Abdullah* [1992] 1 CLJ 702). This amendment distinguishes between the testimony of a sworn and an unsworn child witness. In the case of a sworn child witness the old rule of prudence applies, viz, the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence. Whereas in the case of an unsworn child witness, s 133A of the Act applies.

Now, reverting back to the complaint of the defence that there must be a preliminary examination of the child witnesses (the victim, Rosfadillah and Norakmawati), I am satisfied, upon perusal of the appeal record, that the trial court had embarked on preliminary examinations of the child witnesses and came to the right conclusions that the child witnesses understood the nature of the oaths as administered to them and, consequently, the child witnesses gave sworn testimonies before the trial court. From the wording of s 133A of the Act, the trial court is obligated by way of a preliminary examination to ascertain the child's capacity to understand and give rational answers. Towards this end, the trial court has fulfilled that obligation and from the appeal record before the victim gave evidence under oath, the following annotations were recorded:

> Mahkamah menyoal saksi untuk memastikan jika beliau memahami sifat keterangan bersumpah. Saksi diingatkan beliau harus bercakap benar dan saksi berkata beliau faham atas maksud sumpah iaitu mesti mengikut apa yang dikatakan dalam sumpah dan dalam keadaan ini untuk bercakap benar. Oleh kerana pada pendapat mahkamah saksi ini faham akan sifat bersumpah (oath) maka saksi ini boleh mengangkat sumpah untuk beri keterangan.

Similar annotations were also made by the trial court before receiving the evidence of Rosfadillah and Norakmawati under oaths. A

The course undertaken by the trial court in recording the annotations in regard to the three child witnesses are certainly laudable and I must say that it is a desirable practice which should be continued. It must be borne in mind that an infant of any age may be sworn as a witness in any criminal case, provided that such infant appears sufficiently to understand the nature and moral obligation of an oath or understands the duty of speaking the truth. In my judgment, competency depends not upon its age, but upon its understanding (*R v Williams* (1835) 7 C & P 320; *R v Travers* (1726) 2 Str 700). B C

R v Whitehead (1866) LR 1 CCR 33 lays down the proposition that a judge who had admitted a witness as competent to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and upon observation of his subsequent demeanour, changes his opinion with regard to the competency of the witness, may stop the examination, strike his evidence out of his notes, and direct the jury to consider the case exclusively upon the evidence of the other witnesses. But in the instant appeal, the three child witnesses excelled tremendously though under great strain while giving their evidence and the trial court had occasion to record the demeanour of the victim in the following words: D

> Mahkamah memerhatikan SP5 [the victim] memberi keterangan dalam keadaan natural tanpa dipengaruhi oleh sesiapa tetapi dengan demeanour yang agak gelisah. E

That 'gelisah' feeling is quite understandable. It is quite embarrassing for her to expose the sordid rape episode in court.

Next, it was argued by the defence that before accepting the evidence of the child witnesses the trial court should conduct a voire dire (trial within a trial) to determine competency. With respect, the question of the voluntariness of the evidence of the child witnesses is not an issue to be adjudicated upon by the trial court. The prosecution was not tendering the cautioned statement of the appellant so as to require a voire dire (trial within a trial) to be conducted to determine the voluntariness of the cautioned statement (see *PP v Mohamed Noor bin Jantan* [1979] 2 MLJ 289 where the Federal Court held that since the defence tendered the cautioned statement at the prosecution stage as a defence exhibit, there was no need to hold a trial within a trial as its voluntariness was not disputed). The competency of any person (child witness included) to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and, clearly, it is a question distinct from that of his credibility when he has been sworn or affirmed. In determining the question of competency, the court acting under s 118 of the Act, is entitled to test the capacity of a witness by putting proper questions. The court has to ascertain the intellectual capacity and understanding of the witness (child witness included) to give a rational account of what he has seen or heard or done on a particular occasion. It can therefore be appreciated that there is a world of difference between competency of a witness which can be F G H I

A ascertained without having to undergo a voire dire, as opposed to the voluntariness of the appellant's cautioned statement, which if challenged, should proceed by way of a voire dire. This objection fails.

The victim recounted the rape episode in regard to the second charge which took place on the bed of Rosnah's rented house rather vividly. She
B said:

> Atuk Sidek (referring to the appellant) buka seluar dia sendiri ... kemudian Atuk tanggal seluar saya ... Atuk suruh saya baring. Dia cium saya. Saya nampak kemaluan dia, kemaluan dia keras ... kemaluan Atuk masukkan sedikit dalam kemaluan saya.

C In regard to the first charge which took place in a small hut (see photograph at p 177 of appeal record), the victim said:

> Apabila Atuk (referring to the appellant) masuk ke pondok dia buka seluar dia, selepas itu dia buka seluar saya pula. Kemudian dia taroh minyak dekat saya punya kemaluan. ... selepas itu dia masuk kemaluan dia pada kemaluan
D saya ... kemaluan dia keras ... Bila dia masuk kemaluan dia dalam kemaluan saya, saya rasa sakit ...

The victim continued further, and this must have caused her to feel 'gelisah', 'Setiap kali kemaluan Atuk (referring to the appellant) masuk dalam kemaluan saya tetapi masuk sedikit sahaja'. On the evening of 28
E April 1991, the victim informed her mother Rosnah, who then lodged a police report on 30 April 1991 after consulting her relatives.

The victim's version in regard to the second charge was corroborated by Rosfadillah who testified that the appellant came to her house on 28 April 1991 in the morning and gave her 60 sen to buy iced water. She went and upon her return, she saw the appellant leaving her house.
F Rosfadillah's evidence in a way corroborated the victim's version in that the appellant quickly put on his pants and left the house when he saw Rosfadillah returning to the house.

In regard to the first charge, Rosfadillah testified that she saw the appellant bring the victim to the small hut and there through the several
G openings therein she peeped and saw that the appellant 'anu' the victim. This piece of corroborative evidence would surely be relevant to impute culpability on the appellant's part. Norakmawati testified that she saw the appellant take the victim to the small hut and through an opening in the window she peeped and saw, 'Tertuduh membuka seluar SP5 [the victim]
H selepas itu tertuduh membuka seluarnya sendiri dan naik atas SP5'. Norakmawati testified that she saw this incident several times and that the appellant committed the offences during the last fasting month.

It is pertinent to point out that when the victim reported the rape to her mother, she spoke of penetration of the appellant's penis into her
I vagina and this must have been the truth because on the printed evidence there is nothing to suggest that the victim was taught to say that. The doctor who examined her on 30 April 1991 at about 2pm testified that there were old tears noted in the victim's hymen at 3, 7 and 9 o'clock. According to the doctor, one of the causes of the tear in the hymen was

sexual intercourse. The victim was cross-examined by the defence about the question of penetration and it was put that the penetration was caused by the penetration of the appellant's finger and the victim was able to respond rather well when she said that she saw both the appellant's hands on the bed and at the same time she felt his penis entering her vagina. Another doctor conducted a potency test on the appellant and he found that the appellant was able to have an erection. In fact as the evidence unfolded, the government chemist detected human spermatozoa on a sheet of thick fabric (kain cadar) which was used in the small hut by the appellant.

It is now established that to constitute the offence of rape, there must be penetration (*R v Hill* (1781) 1 East PC 439). I may add that even the slightest penetration, like in the instant appeal, will be sufficient. So long as penetration is proved but its depth will not injure the hymen, it is sufficient to constitute the crime of rape (*R v M'Rue* (1938) 8 C&P 641; *R v Allen* (1839) 9 C & P 31). Put differently even if the hymen is intact in that there is no rupture, so long as there is penetration it is sufficient to constitute rape (*R v Hughes* (1841) 2 Mood 190).

On perusal of the appeal record, the trial court rightly exercised its discretion in treating the evidence of the child witnesses with utmost caution; the trial court proceeded to apply and warn itself of the rule of prudence that before the appellant could be convicted on the sworn evidence of a child, that sworn evidence must be corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony. It is particularly useful to note here that the trial court had amply warned itself of the danger of accepting the sworn evidence of the two child witnesses, viz, Rosfadillah and Norakmawati in corroboration of the sworn evidence of the victim and, in so doing, the trial court had correctly applied the law to the facts of the case. Lord Goddard CJ in *R v Campbell* delivering the judgment of the Court of Criminal Appeal had this to say on the same point [1956] 2 QB 432 at p 438; [1956] 2 All ER 272 at p 276; [1956] 3 WLR 219 at p 223:

> The sworn evidence of a child need not as a matter of law be corroborated but a jury should be warned not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given. As proper warnings were given by the learned deputy chairman in this case there is no ground on which we can interfere with the conviction.

In my judgment, the evidence of the victim was sufficiently corroborated by the two doctors who examined the victim and the appellant, respectively. In a case of this nature, medical evidence adduced by the prosecution is sufficient to corroborate the evidence of the victim: see Ratanlal and Dhirajlal, 22 *The Law of Crimes* at p 965. It is also my judgment that the

A evidence of the victim was corroborated by her mother, Rosfadillah and Norakmawati.

On corroboration, the lucid exposition in *R v Baskerville* [1916] 2 KB 658 at p 667 is worth quoting. It is as follows:

> B Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

See also *Din v PP* [1964] MLJ 300, FC on the same point.

C Next, the defence submitted that Rosnah's evidence should be scrutinized with care as she gave evidence in her capacity as the mother of the victim and, more so, as she gave evidence for the prosecution. *R v Prater* [1960] 2 QB 464; [1960] 1 All ER 298; [1960] 2 WLR 343 was cited as an authority for the proposition that Rosnah had some purpose of D her own to serve. It was the case for the defence in the instant appeal that Rosnah had fabricated the allegation of rape as her marriage proposal to the appellant was totally ignored. In analysing the evidence of Rosnah and her two infant daughters, the trial court took into account their background, the shame and stigma that might attach to them while giving evidence and, of utmost importance, the attitude of the kampung people to E 'menitikberatkan soal kehormatan dan maruah diri mereka' against the background of the appellant as a respected member of the kampung community. At this juncture, I am reminded of what Ismail Khan J (as he then was) said in *Balasingam v PP* [1959] MLJ 193 at p 194:

> F After all there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

The defence was one of alibi. The appellant testified that he was elsewhere and not at the places mentioned in both the charges and, therefore, he had G no opportunity to commit rape. Several witnesses were called to support his defence of alibi. Once again, the trial court proceeded with care in dealing with the defence of alibi put up by the appellant. That Rosnah was not in the rented house to oversee her two infant daughters on a daily basis was rightly taken into account. Evidence was led to show the following H salient points: Rosnah held a full time job in a factory and she left her two infant daughters in the rented house every day; her two infant daughters testified that they used to spend time at the appellant's house and that the appellant too used to visit their rented house; the proximity between the appellant's house with that of Rosnah; and, lastly, it was the appellant that invited Rosnah to rent his (the appellant's) house. These were the facts I that compelled the trial court to conclude that the appellant had more than ample opportunity to commit rape. I have no quarrel with the conclusions of the trial court on these points and I do not propose to disturb them.

The trial court had rightly and fairly assessed all the evidence and came to the right conclusions in convicting the appellant on both the charges. I have no choice but to confirm the finding of guilty and the conviction of the appellant on both charges.

In regard to sentencing, it is a subject which is of interest to everyone. Except where statute has prescribed a mandatory fixed penalty, a sentencing judge has extensive discretion within the range permissible to impose sentence according to the facts of the case. In my opinion, the statutory rape of the young victim in this case though there was slight penetration must by its very act contain an element of violence. Unfortunately, there are no strict guidelines as to the type of sentences to impose in rape cases. But I venture to say that in committing rape any degree of violence amounting to hurt used will invariably render the rapist liable to a higher punishment under s 376 of the Penal Code (FMS Cap 45). There is no extenuating circumstances in favour of the appellant save that he is now aged 63 years and cannot be whipped (s 289 of the Criminal Procedure Code (FMS Cap 6)). What the appellant did was indeed despicable and public interest would be best served if he is kept longer in prison. I do not propose to disturb the sentence as imposed by the trial court. I confirm that both sentences should run concurrently and it should begin from today.

Appeal dismissed.

Reported by Azra Azman